79-1689

No.

Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

KENNETH S. GELLER
Acting Solicitor General

ALICE DANIEL
Assistant Attorney General

MARK I. LEVY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Questions presented	2
Statement	3
The questions are substantial	10
Conclusion	21
Appendix A	1a
Appendix B	11a
Appendix C	13a
Appendix D	14a

CITATIONS

Cases:

Foley v. *Carter*, Civil Action No. 79-3063 (D.D.C. Mar. 24, 1980)	7, 19
United States v. *Clark*, No. 78-1513 (Feb. 26, 1980)	11
Will v. *United States*, 478 F. Supp. 621	3

Constitution and statutes:

United States Constitution, Article III, Section 1	2, 3, 1a
Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-92, 89 Stat. 419	3, 4, 14a
Federal Pay Comparability Act of 1970:	
5 U.S.C. 5301	4
5 U.S.C. 5305	17a

Constitution and statutes—Continued Page

5 U.S.C. 5305(a) 5
5 U.S.C. 5305(c) 5
5 U.S.C. 5305(c)(2) 6
5 U.S.C. 5305(m) 5
5 U.S.C. 5305-5308 4

Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 763 (1978 Pay Act) 2, 3, 5, 21a
Pay Act of 1976, Pub. L. No. 94-440, 90 Stat. 1439 3
Pay Act of 1977, Pub. L. No. 95-66, 91 Stat. 270 3
Pay Act of 1979, Pub. L. No. 96-86, 93 Stat. 656 ..... 2, 3, 7, 23a
Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 4

2 U.S.C. 356 4
28 U.S.C. 455 10

28 U.S.C. 461(a) 4,5

Miscellaneous:

124 Cong. Rec. (daily ed. June 14, 1978):

p. H5507 13
p. H5508 13
p. H5509 13
p. H5510 13

124 Cong. Rec. S12614 (daily ed. Aug. 4, 1978) 13
125 Cong. Rec. H8138-H8139 (daily ed. Sept. 19, 1979) 18

Miscellaneous—Continued

Page

125 Cong. Rec. (daily ed. Oct. 9, 1979):
p. H8850 ..... 16, 18, 19
p. H8852 ..... 16, 19
p. H8853 18
p. H8854 ..... 16, 18, 19

125 Cong. Rec. S14320 (daily ed. Oct. 10, 1979) 16

125 Cong. Rec. (daily ed. Oct. 12, 1979):
p. H9076 16
p. H9080 16
p. S14483 16
p. S14484 16
p. S14486 ..... 16, 18
p. S14486-S14487 18

125 Cong. Rec. S16706 (daily ed. Nov. 15, 1979) 18

Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation) 5

H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. (1979) 16, 17

H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. (1978) 11, 12

H.R. Rep. No. 96-500, 96th Cong., 1st Sess. (1979) 14, 15

S. Rep. No. 95-1024, 95th Cong., 2d Sess. (1978) 12

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 11

15 *Weekly Comp. of Pres. Doc.* 1530 (Aug. 31, 1979) 6

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-10a) is not yet reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 11a-12a) was entered on February 12, 1980. The United States filed a notice of appeal on March 10, 1980 (App. C, *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 3-4 n.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution and the pertinent portions of the applicable salary statutes are set forth in Appendix D, *infra*, 14a-26a.

QUESTIONS PRESENTED

1. Whether, as a matter of statutory construction, the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 788) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 657) served to supersede or rescind the fiscal year 1979 and fiscal year 1980 cost-of-living increases authorized for Article III judges by the Executive Salary Cost-of-Living Adjustment Act.

2. Whether, at the time the 1978 Pay Act was enacted, the cost-of-living salary increase prescribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution.

3. Whether the 1978 Pay Act, which eliminated a future salary increase scheduled for Article III judges under the Adjustment Act, and the 1979 Pay Act, which prospectively reduced the amount of a salary increase then in effect for Article III judges, violated the Compensation Clause, where the Acts did not represent a discriminatory attack on Article III judges and were not enacted with the purpose or effect of undermining the independence of Article III judges.

STATEMENT

This case is a sequel to *United States* v. *Will*, question of jurisdiction postponed to the hearing on the merits, No. 79-983 (Feb. 19, 1980) (*Will I*). In *Will I*, the district court held that the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) violated the Compensation Clause of the Constitution (Article III, Section 1; App. D, *infra*, 14a) by failing to increase the salary of Article III judges for fiscal years 1977 and 1978 in accordance with the Executive Salary Cost-of-Living Adjustment Act (App. D, *infra*, 14a-17a). The court held in addition that, as a matter of statutory construction, the Pay Acts did not modify or repeal the judges' substantive entitlement to the annual cost-of-living increases authorized by the Adjustment Act. *Will* v. *United States*, 478 F. Supp. 621 (N.D. Ill. 1979). In the instant case, the same district judge, relying on his decision in *Will I*, has held that the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 788) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 657) are unconstitutional under the Compensation Clause and in any event were not intended by Congress to eliminate or reduce the judges' cost-of-living increases prescribed in the Adjustment Act for fiscal year 1979 and fiscal year 1980 (App. A, *infra*, 4a-12a).

1. The operation of the federal pay system is explained in our Jurisdictional Statement in *Will I* (pages 4-8). Insofar as pertinent here, this system may be briefly summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 ("Federal Salary Act"). See 2 U.S.C. 356. Under this Act, the salaries of these officials are reviewed every four years for the purpose of determining and providing appropriate pay levels.

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 (App. D, *infra*, 14a-17a) ("Adjustment Act"). This Act is generally applicable to the offices covered by the Federal Salary Act, including those of the Vice President, Cabinet officers and other Executive Schedule officials, members of Congress, and, pursuant to 28 U.S.C. 461(a), federal judges. Under the Adjustment Act, such salaries are subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305-5308 ("Comparability Act"). Annual cost-of-living ad-

justments in GS rates are based upon the report and recommendations of the President's pay agent as provided in 5 U.S.C. 5305(a) (App. D, *infra*, 17a-18a) or, if the President considers these recommendations inappropriate in light of national emergency or economic conditions affecting the general welfare, upon an alternative plan prepared by the President and not disapproved by Congress. See 5 U.S.C. 5305(c), (m) (App. D, *infra*, 20a-21a). For federal judges, the Adjustment Act provides that cost-of-living increases become effective "at the beginning of the first applicable pay period commencing on or after the first day of the month in which [the GS increase takes effect]." 28 U.S.C. 461(a) (App. D, *infra*, 14a).

2. a. In October 1978, as recommended in the report of the President's pay agent, GS salaries were increased under the Comparability Act by an overall average of 5.5%. Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation). On September 30, 1978, Congress enacted the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789 (App. D, *infra*, 21a-23a) ("1978 Pay Act"). The 1978 Pay Act provided that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 [fiscal year 1979], by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or *judicial branch*, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for Sep-

tember 30, 1978 * * * [if the rate of salary exceeds a specified level]" (*id.* at 22a; emphasis added). Because of this provision, cost-of-living increases of 5.5% that otherwise would have taken effect in October 1978 under the Adjustment Act did not occur for a broad range of ranking government officials, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

b. For fiscal year 1980, the President's pay agent recommended an average GS cost-of-living adjustment of 10.41% under the Comparability Act. See 15 *Weekly Comp. of Pres. Doc.* 1530 (Aug. 31, 1979). However, in light of "[i]nflation [which] continues to be the single greatest threat to our economy and * * * a national problem of foremost concern," the President on August 31, 1979, submitted an alternative plan calling generally for a 7% increase (*ibid.*). The President's alternative plan became effective in October 1979 when neither House of Congress disapproved it within 30 legislative days. See 5 U.S.C. 5305(c)(2) (App. D, *infra*, 21a).

Accordingly, on October 1, 1979 (the beginning of the first applicable pay period commencing on or after the first day of the month in which the GS increase for fiscal year 1980 took effect), two adjustments occurred in the salaries of, among others, federal judges. First, the 7% cost-of-living adjustment for fiscal year 1980 based on the President's alternative plan became effective. Second, since the 1978 Pay Act expired by its own terms on September 30,

1979, the 5.5% increase that the Act had superseded during fiscal year 1979 automatically went into effect. Together, these two adjustments resulted in a compounded salary increase of approximately 12.9%.

On October 12, 1979, however, the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656; App. D, *infra*, 23a-26a) was signed into law. The 1979 Pay Act provides that "[f]or the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay * * *" (*id.* at 24a). The Act further provides (*ibid.*):

> That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of [the 1978 Pay Act], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation [pay raises of 5.5% shall be allowed].

Because of the 1979 Pay Act, the fiscal year 1980 salary increases of all individuals subject to the 1978 Pay Act, including the Vice President, Cabinet officers

and Executive Schedule personnel, members of Congress, and federal judges, were reduced to 5.5% as of October 12, 1979.

3. On October 19, 1979, appellees commenced this litigation in the United States District Court for the Northern District of Illinois. Appellees contended that the 1978 and 1979 Pay Acts were unconstitutional under the Compensation Clause because they deprived Article III judges of the cost-of-living increases authorized in the Adjustment Act. Appellees also asserted that, as a matter of legislative intent, the Pay Acts were only appropriations measures that refused to provide funds for the cost-of-living increases but did not alter the substantive entitlement to the increases pursuant to the Adjustment Act. Finally, appellees argued that the 1979 Pay Act on its face covered only "executive employees, which includes Members of Congress" (App. D, *infra*, 24a) and was simply inapplicable to federal judges.

By order dated January 31, 1980, the district court granted appellees' motion for summary judgment (App. A, *infra*, 1a-10a).[1] The court held that the

---

[1] The court also certified two plaintiff-classes consisting of all persons who served as Article III judges prior to October 1, 1978, and continued to hold office after that date (the Count I class, concerning the 1978 Pay Act), and all persons who served as Article III judges prior to October 1, 1979, and continued to hold office subsequent to October 12, 1979 (the Count II class, concerning the 1979 Pay Act) (App. A, *infra*, 4a). The district judge in this case had been appointed to the bench on October 11, 1977, and thus, unlike the situation in *Will I*, was himself a class member.

1978 and 1979 Pay Acts violated the Compensation Clause "for the same reasons that identical actions by Congress in 1977 were held unconstitutional" in *Will I* (App. A, *infra*, 5a). Based on its view that "subsequent to the 1975 * * * [enactment of the Adjustment Act], the judge's [*sic*] compensation became an annual salary as adjusted by the cost-of-living increase percentage" (*id.* at 6a), the court concluded that the 1978 and 1979 Pay Acts were invalid under the Compensation Clause as "directly diminishing the compensation provided for by statute for federal judges" (*id.* at 8a). The court also found that the 1978 and 1979 Pay Acts, in failing to appropriate funds for cost-of-living increases, were not intended by Congress to "repeal, suspend, or postpone the operation of the * * * Adjustment Act as it applies to federal judges. * * * [T]he failure to appropriate funds does not defeat a governmental obligation created by statute" (*id.* at 8a, 10a). Finally, with regard to an issue that had not been presented in *Will I*, the court noted that it was "inclined to agree with [appellees'] contention" that the 1979 Pay Act is inapplicable to federal judges because "they are neither 'executive' employees nor 'members of Congress,' " but the court did not consider the question further because of its determination that the Act would be unconstitutional if it did apply to Article III judges (*id.* at 9a). The court thus entered judgment for appellees in the full amount of the unpaid cost-of-living increases due them without regard to the 1978 and 1979 Pay Acts (App. B, *infra*, 11a-12a).

THE QUESTIONS ARE SUBSTANTIAL

This case is closely related to the currently pending case of *United States* v. *Will*, question of jurisdiction postponed to the hearing on the merits, No. 79-983 (Feb. 19, 1980) (*Will I*). Both cases present the questions whether Congress intended the various Pay Acts to supersede the annual Adjustment Act increases for federal judges, and, if so, whether the Acts are constitutional under the Compensation Clause. Both cases are class actions brought against the United States on behalf of Article III judges, and both cases were decided by the same district judge, who rested his decision in the instant case largely on his prior opinion in *Will I*.

For the reasons stated in our Jurisdictional Statement in *Will I*, the Court should note probable jurisdiction in this case.[2] Moreover, because substantially the same issues are presented in both cases, and because a prompt and complete resolution of these issues is desirable, we believe that the two cases should be consolidated for purposes of briefing and

---

[2] In *Will I*, the Court has postponed the question of jurisdiction to the hearing on the merits and has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (Order of Feb. 19, 1980). The issue of judicial disqualification under 28 U.S.C. 455, and the effect of that statute on the "rule of necessity," are also presented in the instant case. See also note 1, *supra*. As discussed in our Jurisdictional Statement in *Will I* (pages 15-17 n.12), we believe that the "rule of necessity" is applicable here and that the district judge and the Justices of this Court are not disqualified in this case.

oral argument. See R. Stern & E. Gressman, *Supreme Court Practice* § 14.10, at 750-751 (5th ed. 1978).[3]

1. As in *Will I*, the instant case presents a preliminary issue whether Congress intended the 1978 and 1979 Pay Acts to supersede or rescind the cost-of-living increases authorized for federal judges by the Adjustment Act. If the district court correctly concluded that Congress did not so intend, it would be unnecessary for the Court to consider the constitutional issues presented. See *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 4-5. Accordingly, we shall first address these statutory questions.

a. Appellees contended below, and the district court held, that the 1978 and 1979 Pay Acts were merely appropriations measures that refused to fund the cost-of-living increases but did not alter the substantive terms of the Adjustment Act. We submit that there is ample indication of Congress' intent substantively to supersede the Adjustment Act increases for fiscal years 1979 and 1980.

The legislative history of the 1978 Pay Act plainly establishes that Congress intended to bar the cost-of-living increases scheduled for October 1978. The House report noted that the Pay Act was a "change [in] the application of existing law" (H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. 31 (1978)) and ex-

---

[3] A motion to consolidate the cases for briefing and oral argument will be filed shortly.

plained that it

> provid[es] for *a pay freeze* for those individuals in the legislative, executive, and judicial branches and in the government of the District of Columbia, whose rate of pay was directly or indirectly increased as a result of the pay increases which went into effect in 1977 under the [Federal Salary Act]. Under the proviso, any individual whose rate of pay is $47,500, or more, is covered *by the freeze during fiscal year 1979.*

Id. H.R. Rep. No. 95-1254, *supra*, at 35 (emphasis added); see also *id.* at 29, 39. The Senate report expressed the same understanding, emphasizing that the 1978 Pay Act "continues for fiscal year 1979 the so called 'cap' on upper level salaries in the Legislative, Executive, and Judicial branches of government." S. Rep. No. 95-1024, 95th Cong., 2d Sess. 50 (1978).[4] And the floor debates consistently recognized that the 1978 Pay Act was designed to eliminate the scheduled cost-of-living increase. In intro-

---

[4] We also note that the 1978 Pay Act expressly provides (App. D, *infra*, 23a; emphasis added):

> For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, *the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.*

This provision basing employee benefits and deductions on the employee's salary after application of the 1978 Pay Act serves to confirm Congress' understanding that the Pay Act was a substantive limitation of the cost-of-living salary increase for fiscal year 1979.

ducing the Act, Representative Shipley, the subcommittee chairman, stated that the Act "provides for a pay freeze for those individuals in the legislative, executive, and judicial branches * * * whose rate of pay was either directly or indirectly increased [in 1977 under the Federal Salary Act]." 124 Cong. Rec. H5507 (daily ed. June 14, 1978). Representative Armstrong, the ranking minority member of the subcommittee, similarly explained that "automatic cost-of-living increases will not be permitted * * *." *Id.* at H5508.[5]

An examination of the 1979 Pay Act likewise reveals that Congress intended the statute substantively to reduce the annual cost-of-living adjustment for fiscal year 1980. The Act explicitly states (App. D, *infra*, 24a-25a) that "notwithstanding the provisions of * * * the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay * * *, [the 1978 Pay Act], which

---

[5] See also 124 Cong. Rec. H5509 (daily ed. June 14, 1978) (remarks of Rep. Derwinski) ("limit high-level salaries at this time, and that would include judiciary and executive branch as well as legislative"); *id.* at H5510 (remarks of Rep. Pattison) ("blocks Members of Congress and top-level Federal officials from receiving the 5-percent so-called cost-of-living salary adjustment this year. This is the second year in a row that we have refused a scheduled increase in our salaries. * * * [W]e rejected last year's adjustment and we are doing so again this year. * * * I am in complete agreement to turning down the pay raise this year"); *id.* at S12614 (daily ed. Aug. 4, 1978) (remarks of Sen. Sasser) ("freeze, during fiscal year 1979, the pay of any individual in the executive, legislative, and judicial branches of Government whose rate of pay is $47,500 per year or more").

limit[s] the pay for certain Federal offices and positions, shall apply * * * for the fiscal year 1980, except that [pay increases not to exceed 5.5% shall be allowed]." The Act also provides (*ibid.*) that the 5.5% increase "if accepted shall be in lieu of the 12.9 percent [otherwise] due for such fiscal year [1980]." On its face, then, the 1979 Pay Act clearly demonstrates that it was designed to limit the cost-of-living salary increases for fiscal year 1980 irrespective of the Adjustment Act or any other provision of law.

The legislative history of the 1979 Pay Act confirms that the legislation constituted a substantive enactment. The House report stated that the Act "reduces Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum," a result that was recognized to be a "change [in] the application of existing law." H.R. Rep. No. 96-500, 96th Cong., 1st Sess. 7 (1979). In explaining the purpose of the Pay Act, the House report further stated (*id.* at 3; emphasis added):

> Our problem is that our rate of inflation is so great that we must take immediate steps to moderate increases and help move toward stability.
>
> One of these places where such laws have taken over is that of Federal executive pay, which *under existing law* would increase by 12.9 percent.
>
> In an effort to help deal with these problems, the committee is providing that for the fiscal year 1980, funds available for payment to execu-

> tive employees, which includes Members of Congress, who *under existing law* are entitled to approximately 12.9-percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5-percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year. This action, *sharply decreasing such automatic increases*, is taken in an effort to contribute toward the objective of immediately slowing and over a period eventually stopping further inflation. *The limitation of 5.5 percent represents a significantly sharp decrease* and amounts to only about one-fourth to one-third of the actual rate of inflation during this period. It is hoped that this example will be followed by other parts of the Federal Government, private industry, and State and local government. Unless we slow down, we face disastrous inflation which has wrecked the economy of other nations.[6]

The Conference report reiterated that, in order to help combat the urgent national problem of inflation, the 1979 Pay Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including Cabinet officers, agency heads, Members of the House of Representatives and Senators, federal judges, various high ranking departmental and agency officers, cer-

---

[6] The House report also recognized (H.R. Rep. No. 96-500, *supra*, at 3) that "in the last 2 years * * * [since the quadrennial review of 1977] Federal executive pay has been frozen."

tain supergrade personnel, and others * * *." H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. 3 (1979). And the debate in both Houses plainly disclosed the congressional understanding that the 1979 Pay Act would restrict the salary increase for fiscal year 1980 to 5.5% and thereby prevent the larger increase provided under the Adjustment Act.[7]

Thus, we submit that the 1978 and 1979 Pay Acts plainly were intended by Congress to supersede the provisions of the Adjustment Act authorizing cost-of-living increases for fiscal years 1979 and 1980.

---

[7] See 125 Cong. Rec. H8850 (daily ed. Oct. 9, 1979) (remarks of Rep. Latta) ("the 5.5 percent the Committee on Appropriations has allowed * * * is a reduction from the 12.9 percent authorized under present law"); *id.* at H8852 (remarks of Rep. Whitten) ("[t]his action * * * sharply decreas[es] such automatic increases"); id. at H8854 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.* at S14320 (daily ed. Oct. 10, 1979) (remarks of Sen. Magnuson) ("a 5.5 percent pay raise"); *id.* at S14483 (daily ed. Oct. 12, 1979) (remarks of Sen. Young) ("a 5.5 percent pay raise * * * [the Act would] reduce that 12.9 [percent salary increase] to 5.5 percent. * * * This provides for limiting the cost-of-living increase to 5.5 percent, rather than the 12.9 percent automatic increase now in effect"); *ibid.* (remarks of Sen. Byrd) ("put a cap on that [12.9 percent] pay increase and make it 5.5 percent"); *id.* at S14484 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation [on the 12.9 percent increase]"); *id.* at S14486 (remarks of Sen. Stevens) ("the 5.5 [percent] pay cap"); *id.* at H9076 (remarks of Rep. Whitten) ("a cap on the amount of compensation * * * which limits the amount to the 5.5 percent as against the 12.9 percent which is provided by law, but for which no appropriation has been made"); *id.* at H9080 (remarks of Rep. Conte) ("reduces from 12.9 to 5.5 percent the increase in pay").

b. With respect to the 1979 Pay Act, the additional statutory question is presented whether the Act applies at all to federal judges. Appellees argued below, and the district court indicated that it was "inclined to agree" (App. A, *infra*, 9a), that the Act is inapplicable to judges because it is limited to "executive employees, which includes Members of Congress" (App. D, *infra*, 24a).[8]

We submit that the 1979 Pay Act by its terms does apply to federal judges regardless of whether judges are encompassed within the phrase "executive employees, which includes Members of Congress."[9] Wholly apart from the provision cited by appellees, the 1979 Pay Act expressly states in a separate provision that the 1978 Pay Act, as amended to allow a 5.5% cost-of-living increase, "shall apply" to the fiscal year 1980 adjustments (App. D, *infra*, 24a). Since the 1978 Act unquestionably covers the "ju-

---

[8] See also *Foley* v. *Carter*, Civil Action No. 79-3063 (D.D.C. Mar. 24, 1980). In *Foley*, an action brought by the Director of the Administrative Office of the United States Courts, the district court held, in agreement with the contention of appellees here, that the 1979 Pay Act "does not apply to the judicial branch" (slip op. 11).

[9] In our view, the phrase "executive employees," as used in this area of the law, is a term of art that includes federal judges. Indeed, the very statute that provides the annual salary increase for judges is entitled the "*Executive* Salary Cost-of-Living Adjustment Act" (App. D, *infra*, 14a; emphasis added). The phrase "executive employees" in the 1979 Pay Act therefore should be understood to mean those persons whose cost-of-living increases are governed by the Adjustment Act.

dicial branch" (App. D, *infra*, 22a), it is evident that the 1979 Pay Act on its face is applicable to federal judges.

This conclusion is strongly supported by the legislative history of the 1979 Pay Act. The Conference report unambiguously stated that the Act "restricts Cost-of-Living increases to 5.5 percent instead of 12.9 percent provided by law, for executive employees, including * * * federal judges * * *." H.R. Conf. Rep. No. 96-513, *supra*, at 3. Similarly, Representative Whitten, the manager of the Act in the House, explained that the Act "appl[ies] the 5.5-percent cap to the Federal judges * * *" (125 Cong. Rec. H8853 (daily ed. Oct. 9, 1979)). Other legislators also acknowledged the applicability of the Act to federal judges. See *id.* at H8850 (remarks of Rep. Latta); *id.* at H8854 (remarks of Rep. Jacobs); *id.* at S14486 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at H8138-H8139 (daily ed. Sept. 19, 1979) (remarks of Rep. Derwinski); *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Nothing in this legislative record suggests in any way that federal judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 Pay Act.[10]

---

[10] We recognize that some members of Congress doubted whether the 1979 Pay Act could constitutionally be applied to federal judges to reduce the cost-of-living salary increase that had already become effective. See 125 Cong. Rec. S14486-S14487 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Other members of Congress took the posi-

2. If we are correct that the 1978 and 1979 Pay Acts were intended by Congress to control the cost-of-living increases for federal judges in fiscal years 1979 and 1980, then the Court must consider the constitutionality of the Pay Acts under the Compensation Clause. For the reasons set forth in our Jurisdictional Statement in *Will I*, we submit that the 1978 and 1979 Pay Acts do not violate the Compensation Clause.

a. The Adjustment Act increase for fiscal year 1979 was to become effective for federal judges on October 1, 1978. Thus, when the 1978 Pay Act was signed into law on September 30, 1978, that increase had not yet taken effect. As discussed in our Jurisdictional Statement in *Will I* (pages 22-26), such an expected increase was not part of the judges' compensation at the time the Pay Act was adopted, and therefore the Act did not diminish their compensation.[11]

---

tion that application of the Act to federal judges would not be unconstitutional and urged that the matter be resolved by the courts. See *id.* at H8854 (daily ed. Oct. 9, 1979) (remarks of Rep. Jacobs). Still others simply noted the issue and recommended that it be left to the courts. See *id.* at H8852 (remarks of Rep. Whitten); cf. *id.* at H8850 (remarks of Rep. Latta). However, all of these statements concerning the constitutionality of the Act, including the remarks of Senator Stevens relied on by the district court in *Foley* v. *Carter*, *supra*, slip op. 10-11, were premised on the recognition that the Act, as drafted and eventually signed into law, did apply to judges.

[11] Since Congress enacted the 1979 Pay Act on October 12, 1979, 11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for judges, the 1979 Pay Act cannot

b. In any event, as discussed in the Jurisdictional Statement in *Will I* (pages 27-31), a statute diminishing judicial compensation is not unconstitutional under the Compensation Clause if it does not discriminate against Article III judges or undermine their independence. Here, appellees have never alleged that the Pay Acts discriminated against federal judges or constituted an attack on their independence, and there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions. Rather, the Acts were based on important fiscal policy considerations extending far beyond the federal judiciary, and were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, members of Congress, and judges. In such circumstances, the 1978 and 1979 Pay Acts did not offend the Compensation Clause.

---

be defended on the ground that it was not a diminution of the judges' compensation. No issue is presented in this case concerning judges' pay for the period October 1 through October 11, 1979.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

KENNETH S. GELLER
Acting Solicitor General *

ALICE DANIEL
Assistant Attorney General

MARK I. LEVY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Attorney

APRIL 1980

---

* The Solicitor General has disqualified himself in this case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 79 C 4368

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE R. HARRIS, IRVING HILL, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

ORDER

Before the court are motions by the plaintiff judges for class certification and summary judgment, and a cross-motion for summary judgment filed by defendant. In view of this court's previous decision of August 29, 1979, both of plaintiffs' motions are granted, and, therefore, defendant's motion for summary judgment is denied.

We consider first plaintiffs' motion for class certification. Plaintiffs' propose that the Class in Count I consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1978

and who continued to hold said office subsequent to commencement of the first pay period thereafter. Count I of the Amended Complaint alleges that P.L. 95-391, which became law on September 30, 1978, unconstitutionally diminished the compensation of plaintiffs in the proposed class.

The Class proposed for Count II of the Amended Complaint would consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1979, and who continued to hold said office subsequent to October 12, 1979. Count II of the Amended Complaint alleges that P.L. 96-86, which was passed on October 12, 1979, unconstitutionally diminished the compensation of plaintiffs in the proposed class.

Rule 23 of the Federal Rules of Civil Procedure contains the essential prerequisites for maintaining a class action. Here plaintiff proposes classes under the provision of 23(b)(2).

Rule 23(a) provides that one or more members of a class may sue or be sued on behalf of the class if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

In the instant action, these prerequisites are easily met. Plaintiffs seek to represent a class which consists of more than 600 persons. This is clearly a class so numerous that joinder would be impracticable.

All issues presented in the Amended Complaint are common to each member of the proposed classes—namely, whether Congress' actions in P.L. 95-391 (Count I) and P.L. 96-86 (Count II) violated Article III Section 1 of the United States Constitution. The second prerequisite of Rule 23 is, therefore, satisfied. Likewise, the third prerequisite, that the claims of the representative parties be typical of the claims of the members of the classes, is satisfied, as the claims of the representatives are identical to the claims of every member of the proposed classes. Additionally, the fourth requirement is met in that the named plaintiffs are fourteen members of the United States Courts and their counsel is experienced in litigation of this nature.

The prerequisite of Rule 23(a) having been met, the requirement contained in Rule 23(b)(2) must also be satisfied.

Rule 23(b)(2) provides:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

It is clear from the original and Amended Complaint that the United States, "the party opposing the class," has through Congress' actions "acted or re-

fused to act on grounds generally applicable to the class." And, in light of the claims of the class, declaratory relief is an appropriate remedy as to each class.

Accordingly, plaintiffs' motion for class certification is hereby granted.

The class in Count I shall consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1978, and who continued to hold said office subsequent to commencement of the first pay period thereafter. The class in Count II shall consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1979, and who continued to hold said office subsequent to October 12, 1979.

We now turn to plaintiffs' motion for summary judgment.

This is the second (Will II) of two actions (Will I and Will II) filed by the plaintiff judges, which attack as unconstitutional Congress' attempts to eliminate the cost-of-living increases provided for by law for plaintiffs. Since the present discussion will be brief, the court recommends a reading of our previous decision in Will I, *Will, et al.*, v. *U.S.*, —— F.Supp. —— (N.D. Ill. 1979), No. 78-420 (August 29, 1979).

It is clear from the government's motion in opposition to plaintiffs' motion for summary judgment and in support of its cross-motion that the defen-

dant's misunderstand or have ignored this court's earlier ruling.

In essence, we stated in our earlier opinion (Will I) that Congress' various efforts to avoid paying or eliminating plaintiffs' cost-of-living increases violated Article III § 1 of the United States Constitution. In the instant case, Congress' failure to pay 1978 and 1979 cost-of-living increases violates Article III § 1 for the same reasons that identical actions by Congress in 1977 were held unconstitutional.

Article III § 1 states that Judges of the United States Courts

> shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

It has long been held that this provision of the Constitution imposes upon Congress the duty to "definitely declare what sum shall be received by each judge out of the public funds and the times for payment." See, *Miles* v. *Graham*, 268 U.S. 501, 508-509 (1925); *Evans* v. *Gore*, 252 U.S. 245 (1920); and *Atkins* v. *United States*, 556 F.2d 1028, 1044 (Ct.Cl. 1977).

In 1975, Title 28 U.S.C. § 135 was amended by Congress. In effect, the amendment added a cost-of-living increase component to the stated annual salaries previously received by judges. That amendment read:

> Each judge of a district court of the United States shall receive a salary at an annual rate determined under Section 222 of the Federal Salary Act of 1967 . . . as adjusted by Section 461 of this title.

Section 461 provides that salaries of judges and other executive level employees shall include an annual adjustment measured by the average percentage adjustment of the General Schedule as determined under 5 U.S.C. § 5305.

By statutorily providing for a judge's compensation, which includes an "annual salary . . . as adjusted," Congress complied with their duty under Article III § 1 to definitely declare a compensation to be received by judges.

> When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

See, *Miles* v. *Graham, supra; Evans* v. *Gore, supra*; and *Atkins* v. *U.S., supra.*

Consequently, subsequent to the 1975 amendment to 28 U.S.C. § 135, the judge's compensation became an annual salary as adjusted by the cost-of-living increase percentage.

The facts underlying Count I of the instant complaint are as follows. On September 30, 1978, Congress passed P.L. 95-391 providing in pertinent part:

> No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or

> pay of any individual in any office or position in the . . . judicial branch . . . at a rate which exceeds the rate . . . of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of Title 5, United States Code. . . .

Section 314(a)(1) of P.L. 95-391. Because the federal judges salary was fixed "at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule on September 30, 1978", P.L. 95-391 affected the salary of the plaintiff class of judges.

As of October 1, the annual adjustment became effective. On October 7, 1978, the President issued Executive Order No. 12087, pursuant to the Comparability Act and the Executive Adjustment Act, increasing by an average of 5.5% the rates of pay theretofore paid to plaintiffs and the class. However, due to the prohibition contained in P.L. 95-391, the 5.5% adjustment was not paid to federal judges.

Plaintiff's contend, and this court agrees, that Congress' action of refusing to pay, or withholding the funds to pay, the cost-of-living adjustment violated the provisions of Article III § 1 which provides that a judges compensation shall not be diminished during their continuance in office.

Contrary to the government's contentions, Congress' refusal or failure to appropriate funds does

not repeal, suspend, or postpone the operation of the Cost-Of-Living Adjustment Act as it applies to federal judges. By refusing to pay the adjustment provided for by statute for federal judges, Congress is directly diminishing the compensation provided for by statute for federal judges. Consequently, federal judges, the plaintiffs' herein, are entitled to the 5.5% adjustment effective October 1, 1978.

Count II of the plaintiffs' complaint alleges that similar conduct by Congress in October, 1979 resulted in violations of Article III § 1. This court agrees.

On August 31, 1979, the President submitted a Federal Pay Comparability Alternative Plan which provided "a 7% increase in rates of pay at each grade for most employees under the federal statutory pay systems, including Article III judges." This adjustment took effect on October 1, 1979, the first day of the first pay period, since the plan was not disapproved by either house of Congress. See 5 U.S.C. § 5303(c)(2). In addition, the unconstitutional restriction on the use of appropriated funds contained in P.L. 95-391, discussed above, expired as of September 30, 1979. Consequently, the 5.5% adjustment contained in Executive Order 12087 also became payable on October 1, 1979. The total of these adjustments equaled 12.9% as is confirmed by Congress' adoption of P.L. 96-86, a House Joint Resolution providing in part, as follows:

> For the fiscal year 1980, funds available for payment to executive employees, which includes

> members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum, if accepted, shall be in lieu of the 12.9 percent due for such fiscal year.

This resolution followed thirty days after both the fiscal 1979 and fiscal 1980 adjustments had been determined and had become payable.

Plaintiffs contend that P.L. 96-86 is not applicable to them as they are neither "executive" employees nor "members of Congress." While this court is inclined to agree with plaintiffs' contention, we note that even if it were applicable to plaintiffs, it clearly violates the prohibition contained in Article III § 1 that judges salaries shall not be diminished during their terms of office.

By way of summary, this court wishes to note that Congress has repeatedly done violence to Article III § 1 since they amended 28 U.S.C. § 135 in 1975. Essentially, this amendment retained the previous annual salary component of a judges salary and added that a judge's total compensation would be this annual rate "as adjusted by Section 461 [the Adjustment Act] of this title."

On October 1, 1975, the federal judges received their first and only adjustment pursuant to Executive Order No. 11883 which provided for a 5% adjustment.

Thereafter, Congress has unconstitutionally attempted to avoid paying judges the adjustments. In three instances, the two years challenged in this case (Will II), and one of the years challenged in our prior decision (Will I), Congress refused to appropriate the necessary funds to pay the adjustment provided for by statute. Congress' contention that their actions of not appropriating funds prevented the adjustment from vesting is wholly without merit. Repealing a statute is one thing; refusing to appropriate funds another. And, as we previously noted, the failure to appropriate funds does not defeat a governmental obligation created by statute. See e.g. *State of Louisiana* v. *Weinberger*, 369 F.Supp. 856, 860 (E.D. La. 1973); *New York Airways, Inc.* v. *U.S.*, 369 F.2d 743, 748 (Ct.Cl. 1966).

It is ordered that plaintiffs' motion for summary judgment be and the same is hereby granted. Consequently, defendant's motion for summary judgment is denied.

ENTER

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge, United States District Court

Dated January 31, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 79 C 4368

HUBERT L. WILL ET AL.

vs.

U.S.A.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that, as to Count I of the amended Complaint, judgment is hereby entered for plaintiffs and each member of their class, in the full amount of the unpaid compensation due pursuant to the provisions of the Executive Salary Cost-of-Living Act, P.L. 94-82, for the period October 1, 1978 through the date of this Judgment Order, said amount to be determined without regard for any restriction contained in Section 304(a)(1) of the 1979 Legislative Appropriations Act, P.L. 95-391, and defendant is ordered to pay said amount and to compute the salary of plaintiffs and their class without regard to the referred to restriction contained in Section 304(a)(1).

It is further ordered that, as to Count II of the Amended Complaint, judgment is hereby entered for plaintiffs and each member of their class, in the full amount of the compensation due pursuant to the provisions of the Executive Salary Cost-of-Living Act, P.L. 94-82, for the period October 1, 1979 through the date of this Judgment Order, said amount to be determined without regard for any restriction contained in Section 101(c) of P.L. 96-86 and defendant is ordered to pay said amount and to compute the salaries of plaintiffs and their class without regard to the referred to restriction in Section 101(c) of P.L. 96-86.

It is further ordered that, from the date of this Judgment Order, plaintiffs and each member of their class shall recover the amounts set forth above with interest thereon as provided by law.

Dated at Chicago, Illinois, this 12th day of February, 1980.

H. STUART CUNNINGHAM
Clerk of Court

By /s/ H. R. Chery
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4368

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE R. HARRIS, IRVING HILL, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL

[March 10, 1980]

Defendant, United States of America, appeals under 28 U.S.C. 1252 (1976) to the United States Supreme Court from the judgment of this Court entered on February 12, 1980.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
Special Litigation Counsel
Civil Division
Department of Justice
Washington, D.C. 20530
Phone: (202) 633-4770
Attorneys for Defendant

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Compensation Clause of the United States Constitution, Article III, Section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. Section 205 of the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, 422-423 provides:

> SEC. 205.(a)(1) Chapter 21 of title 28, United States Code, relating to general provisions applicable to courts and judges, is amended by adding at the end thereof the following new section:
>
> "§ 461. Adjustments in certain salaries
>
> "(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the

overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule.

"(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.".

(2) The analysis of chapter 21 of such title is amended by adding at the end thereof the following new item:

"461. Adjustments in certain salaries.".

(b)(1) Section 5 of title 28, United States Code, relating to salaries of justices of the Supreme Court, is amended to read as follows:

"§ 5. Salaries of justices

"The Chief Justice and each associate justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(2) Section 44(d) of title 28, United States Code, relating to salaries of circuit judges, is amended to read as follows:

"(d) Each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(3) Section 135 of title 28, United States Code, relating to salaries of district judges, is amended to read as follows:

"§ 135. Salaries of district judges

"Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(4) The second sentence of section 173 of title 28, United States Code, relating to salaries of judges of the Court of Claims, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(5) The second sentence of section 213 of title 28, United States Code, relating to salaries of judges of the Court of Customs and Patent Appeals, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(6) The second sentence of section 252 of title 28, United States Code, relating to judges of the Customs Court, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(7) So much of the first sentence of section 792(b) (relating to salaries of Court of Claims commissioners) of title 28, United States Code, as precedes ", and also all necessary traveling expenses" is amended to read as follows: "Each commissioner shall receive pay at an annual rate determined under section 225 of the Federal

Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title".

(8) The first sentence of section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), relating to compensation of referees in bankruptcy, is amended to read as follows: "Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates, in the case of full-time referees, not more than the rate determined for such referees under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted under section 461 of title 28, United States Code, and in the case of part-time referees, not more than one-half of such rate, as so adjusted.".

3. 5 U.S.C. 5305 provides in pertinent part:

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendation for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be

deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but no more than 3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing that rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates and the rates of pay for the same levels of work in private enterprise;

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

* * * * *

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

4. Section 304 of the Legislative Branch Appropriation Act, 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789, provides:

SEC. 304. (a) No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—

(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or

(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

(b) For purposes of subsection (a), the rate or maximum rate (as the case may be) of salary or basic pay payable for September 30, 1978, for any office or position which was not in existence on such date shall be deemed to be the rate or maximum rate (as the case may be) of salary or basic pay payable to individuals in comparable offices or positions for such date, as determined under regulations prescribed—

(1) by the President, in the case of any office or position within the executive branch

or in the government of the District of Columbia;

(2) jointly by the Speaker of the House and the President pro tempore of the Senate, in the case of any office or position within the legislative branch; or

(3) by the Chief Justice of the United States, in the case of any office or position within the judicial branch.

(c) For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

5. Section 101(c) of the Act of October 12, 1979, Pub. L. No. 96-86, 93 Stat. 656, 657, provides:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1980, and for other purposes, namely:

* * * * *

(c) Notwithstanding the provisions of sections 102 and 106 of this joint resolution, such

amounts as may be necessary for continuing projects and activities to the extent and in the manner as provided in H.R. 4390, entitled the Legislative Branch Appropriation Act, 1980, as reported June 7, 1979 (except as to executive salaries which are covered subsequently) and such amounts as may be necessary for continuing projects or activities for which disbursements are made by the Secretary of the Senate, and the Senate items under the Architect of the Capitol, to the extent and in the manner which would be provided for in the budget estimates, as amended, for fiscal year 1980.

For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.

Provided, further, That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, and notwithstanding section 102 of this joint resolution, the provisions of section 304 of the Legislative Branch Appropriation Act, 1979, which limit the pay for certain Federal offices and positions, shall apply to

funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

Any additional payment under existing law is not to be construed as an increase in salary or emoluments within the meaning of Article I, section 6, clause 2 of the Constitution, except that:

(1) Any Member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia, or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said Circuit Judge on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution;

(2) The designated United States District Courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office;

(3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and

(4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

For purposes of this subsection, H.R. 4390, as reported June 7, 1979, shall be treated as appropriating $11,000,000 under the headings "OFFICE OF TECHNOLOGY ASSESSMENT," "SALARIES AND EXPENSES"; $200,300,000 under the headings "GENERAL ACCOUNTING OFFICE", "SALARIES AND EXPENSES"; and $50,707,000 under headings "JOINT ITEMS", "OFFICIAL MAIL COSTS".

No funds contained in this section shall be used to remodel the gallery in Statuary Hall in the Capitol into carrels or into any other structure constituting additional office or work space for Members of Congress.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317594 278

Supreme Court, U.S.
FILED
MAY 22 1980
MICHAEL RODAK, JR., CLERK

No. 79-1689

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Appellant,

vs.

HUBERT L. WILL, et al.,
Appellees.

On Appeal from the United States District Court for The Northern District of Illinois.

MOTION TO AFFIRM OR IN THE ALTERNATIVE TO HOLD UNTIL DISPOSITION OF CASE NO. 79-983

KEVIN M. FORDE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, IL 60602
(312) 726-5015
Attorneys for Appellees.

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Jurisdiction 1

Statement 2

Argument 8

I. The Justices Of This Court Are Not Disqualified In This Case 8

II. This Case May Be Resolved On Non-Constitutional Grounds 13

III. If Pub. L. 95-391 or Pub. L. 96-86 Had The Effect Of Altering Or Amending The Adjustments To Which Judges Are Entitled By Law, These Provisions Are Unconstitutional 19

A. The Right To Cost-of-Living Adjustments Is A Component Of Judges' Compensation 20

B. To Prove A Violation Of The Compensation Clause, Appellees Do Not Have To Establish A Scheme To Discriminate Against Judges 25

Conclusion 30

AUTHORITIES CITED

CASES

Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) cert. denied 434 U.S. 1009 (1978) 9, 10, 11, 25

Boddie v. Connecticut, 401 U.S. 371 (1970) 11

Booth v. United States, 291 U.S. 339 (1934) .. 22, 25, 29, 30

Bryon Brown Ralston v. United States, 91 Ct. Cl. 91, cert. denied 311 U.S. 687 (1940) 14

PAGE

Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) 9

Evans v. Gore, 253 U.S. 245 (1970) 8, 9, 11

William Foley v. James Earl Carter (Civil Action No. 79-3063, D.D.C.) 3, 7, 10, 18

Geddes v. United States, 38 Ct. Cl. 428 (1903) 14

Gibney v. United States, 114 Ct. Cl. 38 (1949) 14

Lovett v. United States, 66 F.Supp. 142 (Ct. Cl. 1945) 14

Miles v. Graham, 268 U.S. 501 (1925) 9

Morton v. Mancari, 417 U.S. 535 (1974) 14

New York Airway, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 14-15

Oestereick v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968) 11

Olson v. Cory, ... Cal.3d ....., ... P.2d ..... (March 27, 1980) 10, 23

O'Malley v. Woodrough, 307 U.S. 277 (1939) 9, 25

Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976) 9

Posadas v. National City Bank, 296 U.S. 497 (1936) 14

State of Louisiana v. Weinberger, 369 F.Supp. 856 (E.D. La. 1973) 15

Stiftel v. Malarkey, 384 A.2d 9 (Del. Sup. Ct. 1977) ..22, 23

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 14, 16, 17

Turner v. American Bar Ass'n, 407 F.Supp. 451 (N.D. Tex. 1975) 10

United States v. Corrigan, 401 F.Supp. 795 (D. Wyo. 1975) 9

PAGE

United States v. More, 3 Cranch 160 (Cir. Ct. D.C. 1803) 21

United States v. Hubert L. Will, 70-983 ..... 2, 4

CONSTITUTION AND STATUTES

United States Constitution, Art. III, Sec. 1 Compensation Clause 3, 7-9, 20, 21, 22, 24-29

Act to Maintain Credit of United States Government, Pub. L. No. 73-2, 48 Stat. 8 26

Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 Sections 201-202, 89 Stat. 419 Section 206, 89 Stat. 423 3

Federal Pay Comparability Act of 1970, 5 U.S.C. 5305(C)(2) 3

Fourth Deficiency Act, fiscal year 1933, Pub. L. 73-78, Section 13, 48 Stat. 283 26

Legislative Branch Appropriations Act of 1933, Pub. L. No. 72-212, Section 105, 47 Stat. 382, 401 ..... 26, 28

Legislative Branch Appropriations Act of 1977, Title II, Pub. L. No. 94-440, 90 Stat. 1439, 1446 16

Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, Secton 304(a)(1), 92 Stat. 788-789 .....4, 5, 6, 13, 15, 16, 17, 18, 19

Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 24

Pub. L. No. 96-86, Section 101(c), 93 Stat. 656-57 .....6, 15, 17, 18, 19, 20, 24

28 U.S.C. §5 3

PAGE

28 U.S.C. §44(d) 3

28 U.S.C. §213 3

28 U.S.C. §252 3

28 U.S.C. 135 .....3, 16, 20, 21

28 U.S.C. §455 ..... 2, 8, 11, 12, 13

28 U.S.C. 461(b) 28

MISCELLANEOUS:

Office of Personnel Management Bulletin No. 531-54 (Oct. 12, 1979) 16

Exec. Order No. 12087, 43 C.F.R. 197 (Oct. 11, 1978) 15, 16

2 M. Farrand, The Records of The Federal Convention of 1787 (1966) 29

West, Federal Rules, Civil Procedure, Evidence, Appellate Procedure and Title 28 U.S. Judicial Code, section 135 16

Davis, Administrative Law Treatise §12.04 (1958) 9

Frank, Disqualification of Judges: In Support Of The Bayh Bill, 35 L. & Contemp. Prob. 43 (1970) 12

IN THE
SUPREME COURT OF THE UNITED STATES

No. 79-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

HUBERT L. WILL, et al.,

Appellees.

On Appeal from the United States District Court for The Northern District of Illinois.

MOTION TO AFFIRM OR IN THE ALTERNATIVE TO HOLD UNTIL DISPOSITION OF CASE NO. 79-983

JURISDICTION

While appellees believe that the issues in this case may be resolved without necessarily reaching the constitutional question, they agree with appellant that this Court has jurisdiction to hear the issues of statutory construction as well as the constitutional issues presented in this case. Appellees also agree with appellant that the Justices of this Court are not disqualified from participating in the disposition of this case by the provisions of 28

U.S.C. § 455, and that § 455 in no way limits or otherwise affects the jurisdiction of the Court to hear and decide this case. (See Pp. 8-13, infra). Appellees further respectfully submit that the questions presented in this appeal are not substantial and may be resolved by Motion to Affirm, the judgment of the district court being so obviously correct that further review or argument is not warranted. In the alternative, appellees respectfully submit that the Court should hold this case until disposition of Case No. 79-983. If the decision of the district court in that case is affirmed, that disposition will necessarily resolve all issues presented in this case and this case may be affirmed without further argument.

STATEMENT

This case was decided by the district court on cross-motions for summary judgment. Both sides agreed that there were no genuine issues of material fact. Appellant's answer in the district court admitted all essential fact allegations of plaintiffs' complaint and disputed only the legal conclusions drawn therefrom.

This case is brought by fourteen federal judges on their own behalf and on behalf of all judges of the United States Courts, challenging Congress' refusal to appropriate funds for fiscal 1979 and fiscal 1980 for the payment of annual cost-of-living adjustments to which all judges are statutorily entitled.

Congressional actions in witholding funding for cost-of-living adjustments due judges for fiscal 1977 and fiscal 1978 are the subjects of *United States* v. *Hubert L. Will, et al.*, 79-983 (*"Will I"*). The reduction of judicial compensation in fiscal 1980 is one of the issues presented in

William Foley v. *James E. Carter* (Civil Action No. 79-3063, D.D.C.).[1]

The compensation of a federal district judge is defined in part at 28 U.S.C. § 135[2] as follows:

> Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title [i.e., the Executive Salary Cost-of-Living Adjustment Act].

The Executive Salary Cost-of-Living Adjustment Act,[3] adopted in 1975, ("Adjustment Act") provides that the salaries of certain federal employees, including judges shall be adjusted annually in an amount measured by the average adjustment in General Schedule salaries as determined under the Federal Pay Comparability Act of 1970 [hereinafter the "Comparability Act"], 5 U.S.C. § 5305, et seq. These percentage adjustments are submitted to Congress by the President, and for judges, become payable without further action by Congress on October 1 of each year (the first day of the fiscal year), unless within 30 days of their submission either House of Congress adopts a resolution disapproving the President's report.[4] However, in each of the past four years

---

[1] That case challenges the reduction on behalf of all affected officers and employees of the Judicial Branch. On March 24, 1980 the district court held that the purported reduction did not apply to the Judicial Branch and granted motions of plaintiff and Intervenors (Appellees here) for summary judgment.

[2] Similar provisions apply to the compensation of other Article III Judges. See 28 U.S.C. §§ 5, 44(d), 213, and 252.

[3] See Jurisdictional Statement ("J.S.") Appendix 14a-15a.

[4] In which case the President must follow the recommendations of the Advisory Committee on Federal Pay. 5 U.S.C. § 5305(c)(2).

Congress has withheld funds sufficient to pay the adjustment. Thus, although judges' salary levels have been adjusted upward each year since 1975 as required by the applicable provisions of the Adjustment Act, Congress has refused to pay the full amounts provided by law. Only the first adjustment in the amount of 5% for fiscal 1976 (effective October 1, 1975) was paid. That adjustment, which marked the first increase in judicial compensation in more than six years, increased the salary of a district judge from $40,000 to $42,000.

As noted above, the actions of Congress in withholding funding for fiscal years 1977 and 1978 (commencing October 1, 1976 and October 1, 1977 respectively) are the subjects of *Will I,* No. 79-983. Its refusal to fund the fiscal 1979 adjustment (commencing October 1, 1978) and its refusal (on October 12, 1979) to appropriate funds for the full payment of fiscal 1980 salaries at the pay levels which even Congress conceded had become effective twelve days earlier, are the subjects of this case.

The Fiscal 1979 Adjustment

In October of 1978, all salaries under the Comparability Act were increased by an overall average of 5.5%. Funding for these adjustments was withheld for judges and certain other officers of the United States by virtue of a provision of the 1979 Legislative Branch Appropriation Act (Pub. L. 95-391, 92 Stat. 763) which provided in part for fiscal 1979:

> "No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the . . . judicial branch . . . at a rate which exceeds the rate

> . . . payable for such office or position for September 30 1978. . . ." (J.S. App. 22a)

Payment of the 5.5% salary adjustment for fiscal 1979 was thereby withheld from all federal judges. That limitation was temporary only and expired at the close of the 1979 fiscal year, *i.e.*, September 30, 1979.

Although the legality of this appropriations limitation, as it pertains to the salary payments to judges during fiscal 1979, is disputed, appellant has conceded in this case that judges became entitled to this adjustment effective October 1, 1979, at the latest.[5]

In its Jurisdictional Statement (See J.S. 6-7), appellant acknowledges that effective October 1, 1979, and at least until October 12, 1979 (when the "pay reduction act," Pub. L. 96-86, was enacted), judges were entitled to this 5.5% adjustment. Moreover, as will be discussed *infra*, p. 15, even the appropriations limitation contained in Pub. L. 96-86, which attempts to roll back salary levels, acknowledges that the fiscal 1979 adjustment became effective not later than October 1, 1979.

---

[5] In its "Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment" filed in the district court, appellant states:

> The 1979 Pay Act was an appropriations measure expiring at the end of the fiscal year, and it extinguished the 1979 cost-of-living increase only during fiscal 1979 which ended on September 30, 1979. (p. 4, n. 3.)
>
> On October 1 the 1979 Pay Act expired, and those individuals subject to § 304(a), including . . . judges became entitled to the 1979 cost-of-living increase of 5.5%. (p. 11)

The Fiscal 1980 Adjustment

On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become effective October 1, 1979. Appellant concedes that that adjustment went into effect on October 1, 1979. (J.S. 6-7, 14, 19, n. 11, and note 5, *infra*) Accordingly, on October 1, 1979, two events occurred. First, the limitation imposed under the 1979 Legislative Branch Appropriation Act, if ever valid as to judges, expired, freeing the 5.5% increase to become payable. Additionally, the fiscal 1980 adjustment of approximately 7% became payable. The aggregate of the 1979 and 1980 adjustments resulted in a total adjustment of 12.9% over the rates actually being paid judges prior to October 1, 1979. On October 12, 1979, Congress adopted Pub. L. 96-86 (J.S. App. 23a-26a), a Joint Resolution intended to provide appropriations for certain agencies, which included a proviso that, for the fiscal year 1980, "funds available for payment to *executive employees . . . who under existing law are entitled to approximately 12.9% increase in pay,* shall not be used to pay any such employee or . . . official any sum in excess of 5.5% increase in existing pay and such sum if accepted shall be in lieu of the 12.9% due for such fiscal year." (emphasis added).

In the Court below, plaintiffs (appellees here) contended that the limitations contained in the 1979 Legislative Branch Appropriation Act did not have the effect of altering or amending the statutory salary of judges, and that the adjustment of 5.5% for fiscal 1979 went into effect and became payable effective October 1, 1978. Appellees main-

tained that the fiscal 1980 adjustment went into effect and was payable as of October 1, 1979 (a fact which is not contested) and that the efforts of Congress to limit funding for that adjustment (if intended to apply to the judiciary) were invalid. Appellees also contended that, if either of these limitations did prevent the adjustments from taking effect, or if the pay reduction provision of Pub. L. 96-86 applied to judges, they were in violation of the Compensation Clause of Article III, Section 1 and were therefore unconstitutional.

The district court granted summary judgment in favor of appellees on both counts of the complaint, and entered judgment for fiscal years 1979 and 1980.[6]

---

[6] In the *Foley* case (see p. 3, n.1 *supra*) the Director of the Administrative Office of the United States Courts sought declaratory judgment and mandamus relief in the United States District Court for the District of Columbia to compel the President to direct that the Director pay the appropriate (12.9%) increase to federal judges and other Judicial Branch employees. *Foley* v. *Carter*, No. 79-3063. On March 24, 1980 the district court granted motions for summary judgment presented by the plaintiff-director and by the appellees in this case who intervened in that case, holding that the fiscal 1980 limitation did not apply to the Judicial Branch.

ARGUMENT

I. The Justices of this Court are not disqualified in this case.

Appellees agree fully with the Solicitor General in his statement that this Court has jurisdiction in this case and that "the district judge and the Justices of this Court are not disqualified in this case." (J.S. 10 n.2)

All of the Justices of this Court are members of the classes in this action. Accordingly, this circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has "a financial interest in the subject matter in controversy" or "is a party to the proceeding." See 28 U.S.C. § 455(b)(4) and (5)(i). However, because the outcome in this case necessarily will affect salary levels of all Article III Judges, every federal judge has the same interest in the controversy. This circumstance, of course, does not and cannot close the courthouse door to appellees. In many similar circumstances, our Courts, including this Court, have invoked the long established "rule of necessity" which provides that no judge is disqualified if there is no "disinterested" judge or forum available to decide the case. In this manner, litigants are insured that they will not be deprived of their right to the judicial process provided by law, and public interest considerations are protected through judicial review of significant constitutional questions. This subject was discussed at length in *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920), which involved a plaintiff-judge claiming that the federal government could not constitu-

tionally require an Article III Judge to pay income tax. That case was decided notwithstanding a statute which disqualified any judge who was "in any way concerned in any suit pending. . . ." 36 Stat. 1090 (1911). The *Evans* Court, discussing the question of disqualification, held:

> Because of the individual relation of the members of this Court to the question . . . we cannot but regret that its solution falls to us, and this although each member has been paying the tax in respect of his salary voluntarily and in regular course, but jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course. . . . In this situation the only course opened to us is to consider and decide the cause — a conclusion supported by precedents reaching back many years. 253 U.S. at 247-48.

Subsequently, the Court decided two other cases presenting similar issues. See *Miles* v. *Graham,* 268 U.S. 501 (1925) and *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939). After surveying the field, a leading authority on administrative law wrote in 1958 that *Evans* v. *Gore* still states the law on this subject. Davis, *Administrative Law Treatise* § 12.04 (1958).

The rule of necessity was more recently invoked in *Duplantier* v. *United States,* 606 F.2d 654, 662-63 (5th Cir. 1979); *Atkins* v. *United States,* 556 F.2d 1028, 1039-1040 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978); *Pilla* v. *American Bar Ass'n,* 542 F.2d 56, 58-59 (8th Cir. 1976); *United States* v. *Corrigan,* 401 F.Supp. 795 (D.

Wyo. 1975); *Turner* v. *American Bar Ass'n,* 407 F.Supp. 451 (N.D. Tex. 1975) and *Foley* v. *Carter, supra* (p. 3, n.1)[7]

In *Atkins,* prior to undertaking consideration of that case, the members of the Court of Claims submitted a certificate to this Court in which they expressed their belief that the disqualification statute, "taken literally, requires each of them to disqualify himself in these cases, because each has an interest in the subject matter of the controversy that could be substantially affected by the outcome of the proceeding." Plaintiffs' Brief On The Question Of Disqualification, App. p. 5a. (No. 75-1728). The Court of Claims Judges then stated that they were uncertain as to whether the pre-existing "doctrine of necessity" nevertheless permitted or required them to sit, as an "implied exception" to the disqualification statute. On that basis and before proceeding to hear and determine the *Atkins* case, the Judges asked the guidance and advice of this Court.

This Court then invited the parties in the case to submit briefs on the question certified by the Court of Claims. Pursuant to that invitation, the Solicitor General and the plaintiffs submitted extensive briefs, *both* concluding that neither the current disqualification statute nor any earlier version thereof was ever intended to abolish the well-established common law "rule of necessity" or to overrule the decisions of this Court and other federal Courts directly on point. It appears obvious that any attempt by Con-

---

[7] The Supreme Court of California also recently invoked the "rule of necessity" in reviewing the rights of California Judges (including the Supreme Court) to cost-of-living adjustments under circumstances similar to those presented in this case. *Olson* v. *Cory,* ..... Cal. 3d ....., ... P.2d ..... (March 27, 1980). See p. 23 *infra.*

gress to do so would be an unconstitutional infringement upon the power of this Court to determine certain constitutional questions. Congress cannot lawfully foreclose access to the courts by citizens asserting the infringement of a basic constitutional right. See, *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968). Cf. *Boddie* v. *Connecticut,* 401 U.S. 371 (1970). Indeed, in his brief in the *Atkins* case, the Solicitor General agreed with the proposition that, if Section 455 was interpreted to prevent one class of litigants from seeking a judicial resolution of their claims, constitutional problems would arise.[8]

In *Atkins,* the Solicitor General also directly considered whether the vitality of the rule of necessity invoked in *Evans* v. *Gore* was in any way affected by the adoption of the current disqualification statute, 28 U.S.C. § 455, in 1974. After a review of the legislative history, he concluded that "nothing on the face of the statute or in its legislative history suggests any intent to change that long-standing doctrine." The Solicitor General added:

> To the contrary, statements in the committee reports and hearings expressly indicate that Section 455 was designed merely to establish objective criteria for selecting which among many qualified judges should preside over a lawsuit; there was no intention to abrogate the rule designed to cover the unique situation where all federal judges may technically be disqualified. (No. 75-1728, Memorandum of the United States, p. 6)

---

[8] See No. 75-1728, Memorandum for the United States, p. 8, n. 5 citing Redish and Woods, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis," 124 U. Pa. L. Rev. 45 (1975).

Our review of the legislative history of the current statute as well as its predecessors leads to the same conclusion, *i.e.*, there is no indication anywhere in the legislative history of Section 455 that it was intended to modify or overturn the long-standing doctrine of the rule of necessity.[9] In fact, the legislative history suggests a congressional intent to preserve the rule. Senator Birch Bayh, the author of the revised disqualification statute, testified that the changes effected in 1974 reflected the opinions of Professor John P. Frank. See Frank, "Disqualification of Judges: In Support of the Bayh Bill," 35 L. & Contemp. Prob. 43 (1970). Professor Frank's article recognized the "rule of necessity" as an integral part of any disqualification statute. (Id. at 44)[10]

Finally, appellees respectfully submit that any suggestion that the disqualification statute was intended to overturn the rule of necessity and forever close the door to appellees' claims would suggest consequences which go well beyond this case. Suppose, for example, Congress enacted a statute shortening every federal judge's term to 10 years, unless every judge is approved again by the Senate. Such legislation would obviously be unconstitu-

---

[9] See Hearings before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, on S. 1064, July 14, 1971; May 17, 1973; S. Rep. No. 93-419 (93rd Cong., 1st Sess., 1973); H. Rep. No. 93-1453 (93rd Cong., 1st Sess., 1974); Debate: 119 Cong. Rec. Daily Ed. (Oct. 4, 1973, Senate); 119 Cong. Rec. Daily Ed. (Nov. 21, 1974, Senate); 120 Cong. Rec. Daily Ed. (Nov. 18, 1974, House).

[10] The Senate and House Reports also refer to Professor Frank's testimony. S. Rep. 93-419 (93rd Cong., 1st Sess. 1973, at p. 3); H. Rep. 93-1453 (93rd Cong. 1st Sess. 1974, at p. 3.)

tional; and yet, if no judge could hear the case, it would survive without challenge.

In short, 28 U.S.C. § 455 cannot be interpreted to bar the Justices of this Court from hearing the important claims presented in this case.

II. This case may be resolved on non-constitutional grounds.

The principal non-constitutional ground for upholding the appellees' right to pay adjustments is the fundamental proposition that an appropriation bill does *not* amend or repeal a statutory entitlement to salary. The right to a salary adjustment set by a previous statute remains unaffected and enforcible in a court of law. This is a basic, settled principle of federal statutory and appropriations law construction. As stated previously, on October 1, 1978 a salary adjustment of 5.5% went into effect for all federal employees, including judges. This adjustment was not paid to judges, however, because in adopting the 1979 Legislative Branch Appropriations Act on September 30, 1978, Congress included a proviso restricting the use of funds to pay these adjustments. See § 304(a)(1) of Pub. L. 95-391, quoted in relevant part at pages 4-5, *supra*.

The simple nonconstitutional issue presented in this appeal regarding that adjustment is whether this restriction on the use of appropriated funds, contained in an appropriations act, had the effect of repealing the Adjustment Act or otherwise altering the actual rate of judges' pay otherwise in effect. Appellees submit that the restriction merely withheld funds temporarily for the full payment of the lawful salaries of judges, without altering the judges' entitlement to those salaries.

Contrary to the contentions of appellant, appellees respectfully submit that there is no suggestion anywhere in the legislative history that Congress intended to *amend* existing laws. The comments from the debates quoted in the Jurisdictional Statement (see page 13, n.5) relating to "pay freeze" and "holding down increases" and imposing "caps" indicates an intent to *withhold* funds through an appropriation measure, and not an intent to amend existing laws. Indeed, had Congress intended to repeal or amend the Salary Act or the Adjustment Act, it would have said so, bearing in mind the repeated admonitions of this Court that "the intention of the Legislature to repeal must be clear and manifest." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936), as "repeals by implication are not favored," *Morton* v. *Mancari,* 417 U.S. 535, 549 (1974), and "the policy [against repeals by implication] applies with even greater force when the claim to repeal rests solely on an appropriations act." *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 190 (1978).

If the effect of the nonpayment proviso was merely to restrict the use of appropriated funds (thus deferring the payment of an admitted monetary obligation of the United States) rather than to amend or repeal the salary Act or the Adjustment Act, it follows that the judges' claim for full payment of that debt survives. Numerous cases have held that a limitation in an appropriations bill does not have the effect of repealing or even suspending an existing statutory obligation. *Gibney* v. *United States,* 114 Ct. Claims 38 (1949); *Lovett* v. *United States,* 66 F.Supp. 142 (Ct. Claims 1945); *Andrew Geddes* v. *United States,* 38 Ct. Claims 428 (1903); *Byron Brown Ralston* v. *United States,* 91 Ct. Claims 91 (1940), *cert. denied* 311 U.S. 687 (1940); *New York Airways, Inc.* v.

United States, 369 F.2d 743 (Ct. Claims 1966); and *State of Louisiana* v. *Weinberger,* 369 F.Supp. 856, 860 (E.D. La. 1973).

That the limitation contained in the 1979 Appropriations Act did not amend or repeal the Salary Act or the Adjustment Act or in any way alter the rate of judges' pay is clearly demonstrated by the following:

1. In adopting Pub. L. 96-86 (fiscal 1980) (J.S. App. 23a-26a) Congress itself acknowledged that the limitation in the 1979 Appropriations Act (Pub. L. 95-391) was temporary only. The 5.5% adjustment effective October 1, 1978 was a part of the "12.9% increase in pay" to which Congress acknowledged judges were already entitled when Pub. L. 96-86 was adopted on October 12, 1979. By its explicit recognition of federal judges' entitlement to the October, 1978 cost-of-living adjustment, Congress has clearly declared that the fiscal 1979 limitation on the use of funds was restricted to that fiscal year and did not affect the actual 5.5% adjustment in salary levels.

2. In issuing Executive Order 12087 on October 7, 1978, the President officially advised that judicial salaries were adjusted to the stated levels under the provisions of the Salary and Adjustment Acts.[11] Executive Order 12087 bears an asterisk after the adjusted salaries, however, with the caveat that "pursuant to the Legislative Branch Appropriations Act of 1979, *funds are not available* to pay a salary at a rate which exceeds the rate in effect on September 30, 1978." (emphasis added.)

---

[11] Federal Register Volume 43 No. 197 Wed., October 11, 1978, Schedule 7 at p. 46829.

3. The Office of Personnel Management, through OPM letter 531-54 dated October 12, 1979, determined that Section 304 of P.L. 95-391 was merely a "restriction on the use of appropriated funds to pay increases in pay to certain federal officers. . . ." The OPM letter concluded that because this was merely a restriction on the use of appropriated funds, the lawful rates of pay established by Executive Order 12087 became payable on October 1, 1979, after the temporary restriction in Section 304 "expired."

4. Most significantly, for purposes of the instant case, the Solicitor General has conceded in this Court as well as in the district court that the limitation in the 1979 appropriations act was temporary (at best) and expired on October 1, 1979 the end of the fiscal year. (See p. 5, n.5 *supra,* and J.S. 6-7)

5. The Acting Comptroller General of the United States, in interpreting similar language in the 1977 Legislative Branch Appropriations Act, P.L. 94-440 (see Congressional Record—Senate, September 22, 1976, S. 16459-60) has expressed the view that such restrictions in an appropriations bill constitute only limitations on the use of funds and that the true salary includes the adjustment.

6. The authoritative legal publications listing judicial salary levels do so in the *adjusted* amounts. See e.g., West Publishing Co. 1979 Ed., Federal Rules, Civil Procedure, Evidence and Appellate Procedure, 28 U.S.C. § 135. However, consistent with Executive Order 12087, a footnote advises the reader that funds are not available to pay the full rate.

7. Both Houses of Congress have promulgated rules against the amendment of existing substantive legislation in appropriation bills. *See Tennessee Valley Authority* v. *Hill, supra.*

8. There exists a well-established presumption against the implied repeal or suspension of existing legislation, particularly when the claimed repealer rests solely on an appropriations measure. *Tennessee Valley Authority* v. *Hill, supra.*

While it is clear that the 1979 Appropriations Act did not repeal the 5.5% adjustment, appellant's contention that the fiscal 1980 appropriations provision, Pub. L. 96-86, was intended to serve as a substantive amendment to the Salary Act or Adjustment Act is even more tenuous. Like the restriction found in Pub. L. 95-391, the "cap" contained in Pub. L. 96-86 is merely a restriction on the use of appropriated funds for a single fiscal year. It is not, as appellant suggests, substantive legislation which effectively superseded appellees' right to the statutory adjustment. Indeed, Pub. L. 96-86 is even less characteristic of substantive legislation than the fiscal 1979 enactment. Continuing resolutions of Congress are familiar devices to provide temporary appropriations for departments and agencies which require authority to spend at the same level provided in a prior fiscal appropriations. Joint Resolution 412 (Pub. L. 96-86) was adopted to provide continuing appropriations for fiscal 1980 for a number of federal agencies whose prior appropriations had terminated with the close of the fiscal year on September 30, 1979. This was *not* the case for the judiciary. Judicial Branch appropriations for fiscal 1980 had already been approved, on September 24, 1979, (Pub. L. 96-68.) No. special appropriation for the judiciary was needed. By the time the Joint Resolution was adopted on October 12, 1979, judges were already being paid under the previously enacted appropriations act. The resolution limiting use of funds applied to those other agencies that required funding.

There is still an additional reason, however, why the limitation on the use of funds contained in Pub. L. 96-86 does not apply to judges. That Act specifically refers to, "funds available for payment to *executive employees, which include members of Congress* who under existing law are entitled to approximately 12.9% increase in pay, ..." (emphasis supplied) On its face § 101(c) does not refer to the Judicial Branch. In *Foley* v. *Carter* (See p. 3, n.1 and p. 7, n.6 *supra*), the Court so held. In *Foley* v. *Carter* the district court rested its conclusion on a number of persuasive facts. First, § 101 (c) on its face does not purport to repeal or amend the Adjustment Act as it applies to the Judicial Branch. (On the contrary, it acknowledges that there had been an increase of 12.9% effective October 1, 1979) Second, the Act does not purport to revoke or in any way amend or alter the Judicial Branch Appropriations Act of 1980 which provided funds for judicial salaries without restriction. Third, the Act makes no reference to the Judicial Branch although it does refer to Executive employees and members of the Legislative Branch. (By contrast earlier pay-freeze provisions named the Judiciary when limiting payment of full salaries of Judicial Branch employees. See, for example, the Legislative Branch Appropriations Act of 1979, § 304, J.S. App. 22a-23a). Fourth, the leaders of Congress acknowledged that the limitation could not be applied to federal judges.[12]

---

[12] On the Senate side, one of the managers of the bill noted:

> We have a pay adjustment now of 12.9 per cent. Because of the failure to put on a pay cap, we have judges getting 12.9 percent for the rest of their lives. There is nothing we can do about that. *Id.* at §14486.

Finally, any other interpretation poses serious constitutional questions.

For these reasons appellees respectfully submit that neither the Salary Act nor the Adjustment Act were impliedly or explicitly repealed or amended by Pub. L. 95-391 or Pub. L. 96-86 and this Court need look no further to affirm the decision of the district court in this case.

III. If Pub. L. 95-391 or Pub. L. 96-86 had the effect of altering or amending the adjustments to which judges are entitled by law, these provisions are unconstitutional.

From all that is stated above it is clear that the limitation contained in Pub. L. 95-391 (October 1, 1978) and the roll-back provision found in Pub. L. 96-86 (October 12, 1979) could not have the effect of amending the Salary Act or Adjustment Act or of otherwise reducing judges' salaries. Appellees respectfully submit, however, that if these appropriations limitations are viewed as actual amendments to the aforesaid pay statutes, they would effect a reduction in judges' salaries and would result in an unconstitutional diminution in compensation.

With respect to the October 1, 1978 adjustment, the Solicitor General's theory is that because the proviso withholding funds to pay this increase was adopted one day prior to October 1, 1978, the adjustment was only

---

[12] (Continued)

> [I]n the time we have debated this and been at loggerheads with the other body, we have found a situation where one branch of the Government has received a 12.9 percent increase in salary, and we will never lower that. *Id.* at §14487 (remarks of Senator Stevens).

"an expected increase" and "not part of the Judges' compensation." (J.S. 19) With respect to the October 1, 1979 adjustment, the Solicitor General acknowledges that this adjustment was more than an expectation. In fact, the "limitation" contained in Pub. L. 96-86 was not adopted by Congress until "11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for Judges." (J.S. p. 19 n. 11). As the legislation itself recites and the Solicitor General acknowledges, effective October 1, 1979, judges were "entitled to" and received a 12.9% adjustment over rates actually being paid, and this adjustment remained in effect until October 12, 1979 when their salaries were purportedly reduced. The Solicitor General defends this outright reduction on the theory that to establish a violation of Article III, § 1, judges must demonstrate that the reduction was part of a discriminatory scheme designed to encroach upon the independence of the Judiciary. Appellees respectfully submit that the right to a cost-of-living adjustment is an integral part of judges' compensation. It is not an inchoate or unenforceable "expectancy." Moreover, there is no requirement in the Constitution that to establish a violation of Article III, § 1 resulting from a direct diminution in compensation, judges must demonstrate some broad scheme to discriminate against them.

A. *The right to cost-of-living adjustments is a component of Judges' compensation.*

28 U.S.C. § 135 provides that "Each Judge . . . shall receive a salary at an annual rate determined under [the Federal Salary Act] as adjusted by [the Executive Cost-of-Living Adjstment Act.]"[13]

---

[13] See p. 3 *supra*.

Under 28 U.S.C. § 135, the compensation of federal judges is defined as including *both* a base compensation under the Salary Act and an annual percentage adjustment under the Adjustment Act. Providing a statutory scheme for determining a judge's salary, and then declining to appropriate funds sufficient to pay the full salary so determined, including base compensation and the annual adjustment, unlawfully circumvents the prohibition of the Compensation Clause.

Appellant's argument that an adjustment is not a protected element of judges' salaries until it somehow vests on October 1 of each year with the receipt of a paycheck in an amount given by a *previously* submitted precise formula, is inconsistent with common sense and the entire history of Article III, § 1. This issue, we submit, was resolved 177 years ago in the very first reported case to consider the Compensation Clause, *United States* v. *More*, 3 Cranch 160 (Cir. Ct. D.C. 1803). At issue in that case was an act of Congress abolishing fees charged by federal justices of the peace. Judge More claimed that the law could not be invoked as to justices who took office at a time when such fees were lawful. The fees were payable when the services were rendered. Thus, the amount of fees any justice would receive in any year was unknown, or only an "expectancy." Nevertheless, the court held that as to sitting justices, the abolition of these fees was a diminution of compensation in violation of Article III, § 1.

The court below correctly recognized that Article III, § 1 obliges Congress to declare what the compensation of a federal judge shall be and further recognize

that Congress may do so by defining the salary component of a judge's compensation in terms of a specific formula. This is common, if not prevalent, in employment contracts, statutes and other provisions covering most of the American work force, executive and non-executive, including state and local government officers and employees. Hence, while the salary adjustment might not be paid out until October 1 of each year—a point upon which appellant so heavily relies—the entitlement to that adjustment "vested" with the enactment of the 1975 Executive Cost-of-Living Adjustment Act. The report annually submitted by the President to Congress establishes only the actual percentage *amount* of the cost-of-living adjustment for federal employees, based on the previous year's increase in the cost-of-living. The continuing right to the adjustment is provided by statute and protected by Article III, §1.

The Supreme Courts of Delaware and California recently addressed this question in interpreting their own constitutional prohibitions against the diminution of judicial salaries. Citing this Court's decision in *Booth* v. *United States,* 291 U.S. 339 (1934), the Delaware Court observed that the constitutional provision must logically "apply as well to a threat of removing the salary adjustment as the salary itself. . . ." *Stiftel* v. *Malarkey,* 384 A.2d 9 (Del.Sup.Ct. 1977). In that case, the Court considered the same arguments appellant advances here and answered:

> It is argued that a formula supplement like the one in this case is a "future" promise which can be revoked with impunity, whereas a stated salary increase

> would be legally different. We fail to see the basis for such a distinction. (384 A.2d 9, 15-16)

The Court viewed the cost-of-living adjustments *as a part of the judges' compensation* which may not be revoked.

In *Olson* v. *Cory* (p. 10, n. 7 *supra*) the Supreme Court of California affirmed a lower court decision holding unconstitutional an attempt by the California Legislature to place a limit on cost-of-living increases previously provided for judicial salaries. In holding that this legislation was in conflict with the constitutional provision prohibiting the diminution of judges' salaries, the Court stated:

> The primary purpose of that constitutional provision is to 'strengthen the independence of all three branches of the government,' including the judiciary. Security of both tenure and subsistence are important factors in creating and maintaining an independent judiciary. These factors are met by insuring relatively long, fixed terms of office (Cal. Const., art. VI, § 16; Gov. Code, § 71145) and foreclosing reduction in salary during term of office. Should the state arbitrarily limit the cost-of-living salary, the level of subsistence would be reduced. (Slip Opinion p. 15)

Appellees respectfully submit that the right to a cost-of-living adjustment is clearly a component of a judge's compensation. Any argument to the contrary is contradicted by the unequivocal statement by Congress, and the understanding of both the President and the Office of Personnel Management, in analyzing the October 1, 1978 adjustment. It is conceded that the adjustment became pay-

able after the appropriations restriction for that year expired on September 30, 1979. If appellant was correct —and consistent—the "nonvesting" of the fiscal 1979 adjustment by virtue of the restriction in the Appropriations Act would have *eliminated* the adjustment for that year, not postponed it. Yet, in 1979, Congress acknowledged that, judges "under existing law are *entitled* to approximately 12.9 percent increase in pay." Pub.L. 96-86, (J.S. App. 23a-26a) (Emphasis added). As previously indicated, the 12.9% adjustment represents the aggregate of the fiscal 1979 adjustment, payment of which was postponed by the appropriations restriction, and the fiscal 1980 adjustment which became effective October 1, 1979.

The law as to what constitutes diminution is not in dispute. No court has ever narrowed the protection of Article III, § 1 to the bare meaning of cash-in-hand. Congress has defined federal judges' compensation as "a salary at an annual rate determined under Section 225 of the [Salary Act], *as adjusted by* [the Adjustment Act]" (Emphasis added). Congress has left no doubt in its yearly enactments that the cost-of-living adjustment was always considered part of a judge's vested compensation, whether Congress would fund it or not. To hold otherwise would allow a massive flaw in the protective function of Article III, § 1. The opinion of the district court on this ground should be affirmed as clearly correct.

B. *To prove a violation of the compensation clause, Appellees do not have to establish a scheme to discriminate against judges.*

Appellant argues that if this Court agrees that the compensation of judges has been diminished the judgment below must still be reversed on the ground that a diminution in compensation of a federal judge is not unconstitutional unless it is part of a discriminatory scheme designed to encroach upon the independence of the judiciary. The opinion of the district court soundly rejected that proposition. It has never been held by any court that proof of a discriminatory animus is necessary to render a direct diminution of a federal judge's compensation unconstitutional.[14] The rule has always been, and *no* case stands to the contrary, that congressional action which reduces or withholds from a judge that to which he is entitled as compensation is, without more, unconstitutional. This Court so held in *Booth* v. *United States,* 291 U.S. 339 (1934).

The settting of *Booth* was a time of national economic peril much more serious than the current circumstances. During the Great Depression, the federal government considered it necessary to reduce the wages of its employees. This reduction was, at first, not applied to Article III judges. Congress itself recognized that such a

---

[14] Only where the compensation of federal judges has been affected *indirectly* by circumstances constituting or involving a general burden of citizenship, has this Court or any court suggested such a prerequisite to a claim of unconstitutionality. See *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939) (general income tax); *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied.* 434 U.S. 1009 (1978) (inflation).

reduction would violate Article III, § 1. Accordingly, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, section 197(5) provided:

> the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum.

This section accompanied other provisions in the same statute cutting the salaries of other federal employees, including Members of Congress, employees of the District of Columbia, mail carriers, etc. *See, e.g.,* Pub. L. No. 72-212, 47 Stat. 382, 401 (June 30, 1932), section 105.

The next year, more expenditure reductions were economically necesary. In the "Act to Maintain the Credit of the United States Government," Pub. L. No. 73-2, 48 Stat. 8 (March 20, 1933), pensions were reduced, and three months later, in an Act entitled "Fourth Deficiency Act, fiscal year 1933," Pub. L. No. 73-78, 48 Stat. 283 (June 16, 1933), the salaries of additional federal employees were reduced. Section 13 of that later act, 48 Stat. 283, 307, cut the retirement pay of federal judges by 15%. In the same statute, a host of other federal employees' salaries were reduced as well, in similar amounts. There was no discrimination.

Judge Booth, a retired federal judge whose salary had been purportedly reduced, brought suit against the United States. The Solicitor General argued that a *retired* judge was not entitled to the protection of his compensation under Article III, § 1. This Court ruled that retired judges were still entitled to the guarantee of Article III,

§ 1. The Court then considered the question of whether the diminution was unconstitutional. *The Solicitor General had conceded that if a retired judge was an Article III Judge, the diminution would be unconstitutional. This Court agreed*:

> In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction is in excess of that payable when the incumbent took office? *The answer must be in the affirmative.* Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions . . . the Solicitor General with commendable candor admits that *a contrary construction would be subversive of the purpose of §1 of Article III.*

291 U.S. at 352. (Emphasis added)

If the prohibition against diminution were meant to contain the additional proviso hypothesized by the appellant, proscribing diminution of a judge's compensation only when accomplished as a result of discrimination, the Solicitor General would not have conceded otherwise in *Booth* and this Court certainly would not have ruled the challenged statute unconstitutional. The reduction in compensation at issue in that case was in the context of a *general cut in salaries for all federal employees, in the face of severe economic conditions.* The Court would, at least, have been forced to *inquire* into whether the 15% reduction in pay for retired judges was a discrimination calculated to interfere with their independence. No such question was even asked. Had it been, the response would clearly have been negative. Obviously, it was considered irrelevant.

This has been obvious to the Congress as well. As noted above, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, which lowered federal employees' salaries during the Depression, contained the proviso, "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." 47 Stat. 382, 402, Section 197(5).

And in the precise statutory context of this case, the Adjustment Act (which requires that federal judges' salaries be adjusted in the same manner as the salaries of General Schedule employees), specifically exempts federal judges from comparability with the General Schedule on those occasions when such adjustments are downward. Section 461(b) of Title 28, United States Code, states that the Act "shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III . . . be diminished during such individual's continuance in office."

Congress would not have enacted the statutory provisions which excluded the reduction of judges' salaries from a general reduction in the pay of all other federal employees, had it shared the views expressed here by appellant. (Nor would the Solicitor General have conceded the point in *Booth,* were it not for his recognition that "a contrary construction would be subversive of the purpose of §1 of Article III," 291 U.S. 352.)

In sum, both Congress and this Court have consistently held that a direct diminution in the compensation of a federal judge is prohibited, regardless of whether other

federal employees' compensation is likewise reduced.[15] The only exception to this absolute prohibition against diminution has been in the case of an indirect diminution, imposed upon judges by the effect of a common duty of citizenship.

Appellant's suggestion that the compensation of Article III judges may be diminished so long as there is no discrimination, finds no support in judicial decision or congressional action. The motion to affirm may be granted as to this contention on the direct authority of *Booth* v. *United States,* as well as the entire history of the Compensation Clause.

---

[15] The records of the Constitutional Convention support this principle in another respect, as well. The debates and documents of the Convention reflect a concern for the independence of the federal judiciary in the context of insuring against "undue complaisance" by the courts in favor of the legislature when members of the legislative had cases in Court. 2 M. Farrand, *The Records of the Constitutional Convention* 1787, at 44-45 (remarks of J. Madison). It was Madison's view that the temptation to a judge could only be insured against by proscribing both increases and decreases during the judge's term of office. The Convention, however, insisted that a judge serving a life tenure would require upward adjustments in his compensation. But the Convention did enact the prohibition against diminution which, Madison had contended, represented the more serious situation for possible "undue complaisance."

This effort to remove, as far as practicable, the circumstances under which judges might be encouraged to exercise undue complaisance toward the legislature is not advanced by considerations of discriminatory motives.

CONCLUSION

Appellees respectfully move that this Court affirm the judgment entered in this cause by the district court. In the alternative, appellees respectfully submit that the Court should hold this Motion until the disposition of the Appeal in No. 79-983. If the decision of the lower court is affirmed in that appeal, further argument of this case will be unnecessary and this Motion to affirm may be granted summarily.

Respectfully submitted,

KEVIN M. FORDE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, IL 60602
(312) 726-5015
Attorneys for Appellees.

see 79

983